

BEFORE THE
SHORELINES HEARINGS BOARD
STATE OF WASHINGTON

IN THE MATTER OF A SHORELINE
SUBSTANTIAL DEVELOPMENT PERMIT
ISSUED BY PIERCE COUNTY TO
PETER F. DARRAH,

STATE OF WASHINGTON,
DEPARTMENT OF ECOLOGY,

Appellant,

v.

PIERCE COUNTY and PETER DARRAH,

Respondents.

SHB No. 84-44

SUMMARY JUDGMENT ORDER

I

PROCEDURE

1. The Department of Ecology, (DOE) filed its Request for Review in this matter on August 22, 1984.

2. On October 26, 1984, the DOE withdrew its substantive objections to the project and submitted the case to the Board on Motion for Summary Judgment limited to the sole question of whether a variance permit is required for the dock development at issue.

3. On November 7, 1984, the Motion came on for hearing before the Board, Gayle Rothrock presiding. Sitting as the Board were Gayle Rothrock, Lawrence J. Faulk, Wick Dufford, Nancy Burnett, Rodney Kerslake, and Les Eldridge.

II

MATERIALS CONSIDERED

The following were considered by the Board upon this Motion for Summary Judgment:

1. Shoreline Substantial Development Permit granted by Pierce County to Peter Darrah dated June 19, 1984, incorporating conditions set by the Hearings Examiner and by the County Council.

2. Application for Substantial Development Permit of Peter F. Darrah with project drawings.

3. Pierce County Staff report on application of Peter Darrah.

4. Motion for Summary Judgment, together with supporting affidavits of Jay J. Manning and Nora Jewett, filed by DOE on October 26, 1984.

5. Brief in Opposition to Motion for Summary Judgment filed by Pierce County on November 2, 1984, together with accompanying Staff Report on master program amendments dated May 5, 1977.

6. Memorandum in Support of Motion for Summary Judgment filed by DOE on November 6, 1984.

7. The prior decisions of the Board cited herein, and the Pierce County Shoreline Master Program (WAC 173-19-350) of which official notice is taken pursuant to WAC 461-08-185(2).

SUMMARY JUDGMENT ORDER
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III

UNDISPUTED FACTS

1. There are no genuine issues of material fact.

2. On this motion the following are undisputed:

a. Peter Darrah applied to Pierce County on his own behalf and that of his neighbor Bert Nightingale for permission to construct and maintain a joint use dock to serve property abutting the waters of Gig Harbor in the county.

b. The shoreline designation of the dock site is "rural residential" under the Pierce County Shoreline Master Program (PCSMP).

c. The dock was approved as a whole by the County for a total length of 276 feet. This represents the approval of an existing structure, plus an extension.

d. Two hundred fifty-six feet of this dock pre-existed the passage of the Shoreline Management Act.

e. Fifteen percent of the fetch at the location in question is approximately 247 feet.

f. Special circumstances exist which render a 150 foot dock impractical at the site. The larger dock, as approved, would impose no significant additional adverse shorelines impacts.

IV

ISSUE PRESENTED

Does a joint use dock exceeding the lesser of 15% of the fetch or 150 feet in length require a variance permit for approval under the PCSMP?

IV

CONCLUSIONS OF LAW

1. The original Pierce County Shoreline Master Program (PCSMP) was approved by the Department of Ecology (DOE) on April 4, 1975. Although not offered into evidence on this record, we take official notice of its terms as set forth in our earlier decision of Kooley and Pierce County v. Department of Ecology, SHB No. 218 (1976). That original master program provided:

Residential docks on salt water, when allowed, shall meet the following design criteria:

1. Maximum length shall be fifty (50) feet or only so long as to obtain a depth of eight (8) feet, whichever is less at mean lowest low water.

Design Criteria, P. 99 (Emphasis added).

In Kooley, the proposed development consisted of a pier, dock and float exceeding 50 feet in length (Finding of Fact I). Applying the master program to the proposed development in Kooley, we concluded that (1) a variance was necessary, and (2) Department of Ecology's denial of same was correct. We also stated, however:

. . . a long, shallow tidal run-out is common in the area, and appellant and others similarly situated must seek relief by virtue of that circumstance through an amendment of the master program itself. That can only be accomplished by the county legislative body with the approval of the Department of Ecology.

2. Within one year after Kooley, Pierce County amended its master program to delete the language applied in Kooley. In lieu of that language which prescribes that docks shall have a maximum length of 50

feet or obtain a depth of 8 feet whichever is less, the following was adopted:

B. Development guidelines - In lieu of specific standards relating to design, location, bulk and use, the following guidelines shall be applied by the County's reviewing authority to a site specific project application for Substantial Development Permit in arriving at a satisfactory degree of consistency with the policies and criteria set forth in this Chapter. To this end the County may extend, restrict or deny an application to achieve said purposes.

. . .

7. Joint use pier^s and docks.

(a) Maximum intrusion into water should be only so long as to obtain a depth of eight (8) feet of water as measured at mean lower low water on salt water shorelines, or as measured at ordinary high water on freshwater shorelines, except that the intrusion into water of any pier or dock should not exceed the lesser of fifteen (15%) percent of the fetch or 150 feet on salt water shoreline and 40 feet on fresh water shorelines.

PCSMP Section 65.56.040 GENERAL CRITERIA AND GUIDELINES FOR REVIEWING SUBSTANTIAL DEVELOPMENT PERMITS. (Amended Res. #19803, June 14, 1977). (Emphasis added).

Department of Ecology approved this amended language on October 26, 1977. WAC 173-19-350. This is the language applicable to the proposed development.

3. We review the proposed development for consistency with the applicable (Pierce County) shoreline master program and the Shoreline Management Act (SMA). RCW 90.58.140(2)(b).

4. The PCSMP does not require a variance for the proposed

development. Both the language of Section 65.56.040(B) and its evolution from earlier language support this conclusion. In direct, unbroken sequence following our decision in Kooley, cited above, Pierce County amended its shoreline master program to delete the specific standard for dock length and substitute the concept that, "In lieu of specific standards relating to design, location, bulk and use, the following guidelines shall be applied...." PCSMP Section 65.56.040(B) (Emphasis added). The purpose of a variance is stated within WAC 173-14-150 of the DOE:

The purpose of a variance is strictly limited to granting relief to specific bulk, dimensional or performance standards set forth in the applicable master program . . . (Emphasis added).

The stated purpose of a variance would be thwarted by applying it to Pierce County's unspecific guideline rather than a specific standard. Pierce County has repealed its specific standard for dock length in order to tailor its decisions to tidal run-outs of varying length. Dock proposals should be judged by the Pierce County guidelines as interpreted in Northey v. Pierce Co. and Marshall, SHB No. 84-6 (1984), and not by the rules for shoreline variance. Department of Ecology v. Pierce Co. and Martel, SHB No. 84-26 (1984). Department of Ecology v. Pierce Co. and Murphy, SHB No. 84-28 (1984).

5. In Northey, Martel, and Murphy cited above, we concluded that the word "should" is permissive rather than mandatory in the guideline at PCSMP Sec. 65.56.040(B). We concluded, however, that (1) special circumstances must exist which render a 150-foot dock impractical, and

1 (2) that a longer dock must have no significant, additional adverse
2 impact before a dock longer than 150 feet can be allowed. There is no
3 issue as to these substantive concerns in the instant case.

4 6. The proposed development has not been shown to be inconsistent
5 with chapter 90.58 RCW, the Shoreline Management Act.

6 7. A shoreline variance is not required for the proposed
7 development.


8 NOW THEREFORE, IT IS ORDERED that Department of Ecology's Motion
9 for Summary Judgment is denied and its request for review is dismissed
10 as a matter of law.

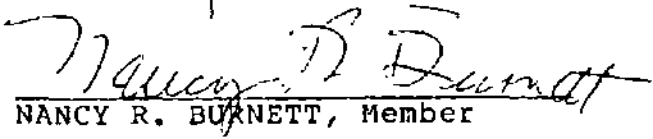
11 DONE at Lacey, Washington, this 7th day of May, 1985.

12 SHORELINES HEARINGS BOARD

13  5/1/85
14 LAWRENCE V. PAULK, Chairman

15 See Dissenting Opinion
16 GAYLE ROTHROCK, Vice Chairman

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18 WICK DUFFORD, Lawyer Member

19 
20 NANCY R. BURNETT, Member

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22 RODNEY M. KERSLAKE, Member

23 
24 LES ELDRIDGE, Member

1 GAYLE ROTHROCK - DISSENTING

2
3 I would grant the Motion for Summary Judgment and, thereby, have
4 the subject permit remanded to Pierce County for review and permit
5 processing under shorelines variance criteria in order to have the
6 20-foot extension to the pre-existing 256-foot dock properly
7 considered.

8 A variance permit is:

9 strictly limited to granting relief to specific bulk,
10 dimensional or performance standards set forth in the
applicable master program.... WAC 173-14-150.

11 PCSMP Section 65.56.040(B)(7) is effectively a dimensional
12 standard imposed on piers or docks.

13 7. Joint use piers and docks.


14 a. Maximum intrusion into water should be only
15 so long as to obtain a depth of eight feet of water
16 as measured at mean lower low water on salt water
17 shorelines or as measured at ordinary high water in
18 fresh water shorelines, except that the intrusion
into the water of any pier or dock should not exceed
the lesser of 15 percent of the fetch or 150 feet on
saltwater shorelines and 40 feet on fresh water
shorelines.

19 This establishes the desired size and length for piers and docks
20 in Pierce County shorelines, and to vary from this standard the
21 criteria in WAC 173-14-150 should be met. At the very least, special
22 use criteria articulated by a local government--a sort of local
23 embodiment of statewide variance criteria--should be employed to
24 further discipline and guide dock length decisions. Otherwise, what
25 value is the standard in 7a. above? The language there is surely not

26 DISSENT-Rothrock
27 SHB No. 84-44

1 a frivolity or meaningless phrase. Regrettably, Pierce County has no
2 written special use criteria, nor do they seek to employ variance
3 criteria. Nothing in the master program explains when larger or
4 longer docks would be appropriate. Thus, there is no manner in which
5 special circumstances can be weighed and measured without the County
6 being subject to charges of arbitrariness or capriciousness on any
7 particular dock permit decision.

8 Failing to construe PCSMP Section 65.56.040(B)(7) as holding a
9 dimensional standard violates the rule of liberal construction of the
10 Shoreline Management Act (SMA). See RCW 90.58.900. Hama Hama v.
11 Shorelines Hearings Board, 85, Wn.2d 441, 446 (1975); and Hayes v.
12 Yount, 87 Wn.2d 280, 289 (1976). Interpreting the "should" in the
13 section in question as something less than an obligation runs counter
14 to several state court decisions. State v. LaPorte, 58 Wn.2d 816,
15 823, 365 P.2nd 24 (1961); Lashley v. Korbort, 26 Ca. 2nd 83, 156 P.2nd
16 441; and others. Adhering to an interpretation of this master program
17 section as permissive, not standard-setting or obligatory offends, the
18 SMA whose stated purpose is planned and rational use of the shorelines.

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20 
21 GAYLE ROTHROCK, Vice Chairman